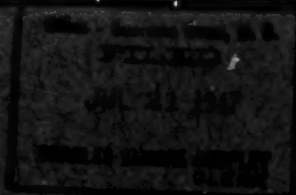


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 219

LEWIS MONTAGUE

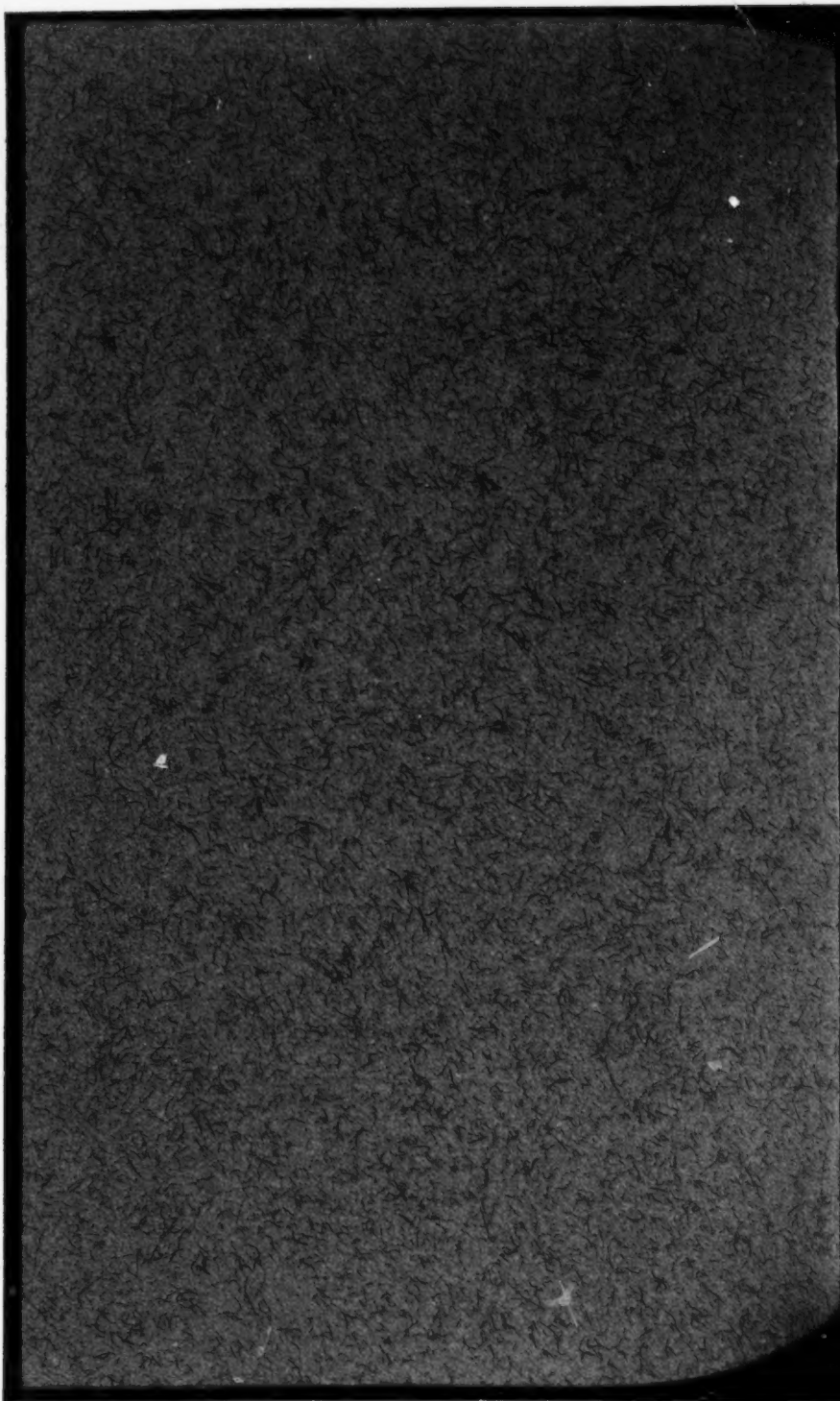
Petitioner,

**CHARLES HENRY SMITH, CHARLES HENRY
SMITH, JR., FANNY J. SMITH, AUBURN GAR-
DENS, INC., a Corp., AUBURN BUILDERS, INC.
a Corp.**

Respondents

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF THE COMMON-
WEALTH OF VIRGINIA AND BRIEF IN SUPPORT
THEREOF**

**SAMUEL B. BROWN,
Counsel for Petitioner,
424 Colorado Building,
Washington 4, D. C.**



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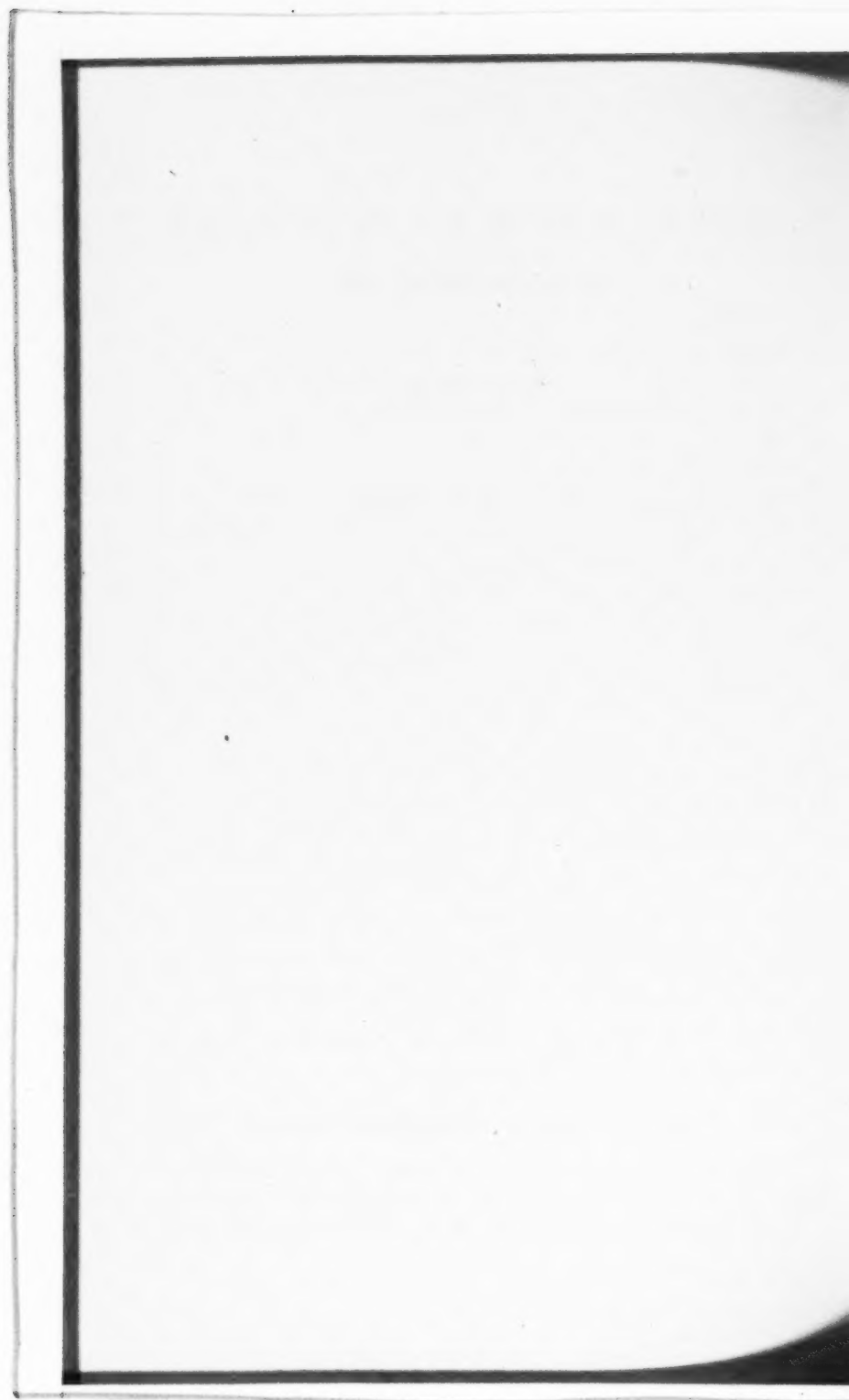
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 219

LEWIS MONTAGUE,

vs.

Petitioner,

CHARLES HENRY SMITH, CHARLES HENRY
SMITH, JR., FANNY J. SMITH, AUBURN GAR-
DENS, INC., A CORP., AUBURN BUILDERS, INC.,
A CORP.,

Respondents

FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The Petition of Lewis Montague respectfully shows to
this Honorable Court as follows:

Summary Statement of the Matter Involved

This is a Petition by Lewis Montague for a writ of cer-
tiorari to the Supreme Court of Appeals of Virginia to
review a decision of that Court (R. 33) which rejected the

Petition of Lewis Montague for an appeal from a decree entered by the Circuit Court of the City of Alexandria, Virginia, on the 4th day of November, 1946, the effect of which was to affirm the decree of the said Circuit Court which had by its decree on the aforesaid date sustained the several demurrers filed by the Respondents to the Bill of Complaint, as amended, and dismissed the same (R. 34-35). This decree was final.

Federal Jurisdiction

The jurisdiction of this Court is invoked under the Soldiers' and Sailors' Civil Relief Act of 1940 as Amended (Act October 17, 1940, c. 888, 54 Stat. 1178, 50 U. S. C. A. 501 *et seq.*), and further under the provisions of the XIV Amendment to the Constitution of the United States of America.

Question Presented

Whether the lower courts in denying Petitioner his rights to maintain his cause of action violated the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 as Amended, *supra*, and further whether there was a violation of Petitioner's rights under the XIV Amendment to the Constitution of the United States of America wherein Petitioner was denied the benefit of the "due process clause."

Statute Involved

Soldiers' and Sailors' Civil Relief Act of 1940, as Amended (R. 19), 50 U. S. C. A. 525, 54 Stat. 1178 as Amended October 6, 1942, c. 581.

Opinions

The Circuit Court of the City of Alexandria, Virginia, in sustaining the demurrers filed against the amended bill in equity of the Petitioner, gave no reason for its action.

The Supreme Court of Appeals in filing its decree rejecting the petition for appeal and sustaining the action of the Circuit Court of the City of Alexandria, Virginia, likewise filed no opinion giving reasons for its action.

Reasons Relied on for Allowance of Writ

Your Petitioner, Lewis Montague, filed a bill of complaint in the Circuit Court of the City of Alexandria, Virginia, wherein he set forth that he was the foster brother of Helen C. Calvert of Alexandria, Virginia, and was jointly interested with her in the development of an apartment building or multiple dwelling to be erected upon a parcel of land owned by Helen C. Calvert and which was located in Alexandria, Virginia (R. 19-20).

For this purpose a corporation was organized. Your Petitioner became one of the incorporators and officers and in consideration of the natural love and affection between the Petitioner and his foster sister, Helen C. Calvert, and the further consideration of services performed by your Petitioner, your Petitioner was to receive one-third ($\frac{1}{3}$) of the total stock to be issued by the corporation (R. 20-21). The corporation which was organized by your Petitioner and his foster sister was known as Auburn Gardens, Inc., and your Petitioner served as incorporator, Vice President, and a director (R. 21). Your Petitioner's foster sister, Helen C. Calvert, transferred to the corporation, in consideration of the stock to be issued to her, the land consisting of approximately twelve (12) acres in Alexandria, Virginia. Your Petitioner contributed to the legal fees and costs of incorporation, and for the preparation of the architectural drawings (R. 22). Your Petitioner and his foster sister consulted with the Respondent, Charles Henry Smith, a member of the bar of Virginia, with offices in the City of Alexandria, on or about September 20, 1938 for the purpose

of securing his services as an attorney to represent your Petitioner and other parties in interest for the purpose of rezoning the land for the construction of the apartment building (R. 22). At this time Respondent Charles Henry Smith suggested that he be paid for his services with stock to be issued by the corporation, to which your Petitioner and his foster sister consented. The amount of stock to be issued was not definitely agreed upon between the parties (R. 23). Subsequently, Charles Henry Smith, as his attorney advised your Petitioner and his foster sister that the Federal Housing Authority would not accept the corporation and that it would be necessary to organize a new corporation in order to qualify (R. 23-24). Thereupon, said Respondent Charles Henry Smith, applied for a new charter and changed the name of the corporation to Auburn Builders, Inc., which was done on August 31, 1939. The authorized capital stock of Auburn Builders, Inc. was twenty-four hundred (2,400) shares of the par value of One Hundred Dollars (\$100.00) each (R. 24). Prior to the incorporation of Auburn Builders, Inc., Helen C. Calvert, for a nominal consideration on February 18, 1939, conveyed by deed her right, title and interest to the parcel of ground to Auburn Gardens, Inc. (R. 24). Charles Henry Smith was elected Secretary-Treasurer of Auburn Builders, Inc., being the then attorney for your Petitioner, Malcolm Kilduff was President and Helen C. Calvert was Vice-President of said Auburn Builders, Inc. Your Petitioner neither resigned nor did he receive any notice of the change, nor had he assigned or released his interest in the corporation known as Auburn Gardens, Inc. Thereafter, Charles Henry Smith, as attorney for your Petitioner, advised your Petitioner and Helen C. Calvert that since all parties who were officers and directors or stockholders in a corporation applying for a guarantee from the Federal

Housing Authority would be investigated and questioned as to their financial worth, it would be better that your Petitioner's name should not appear as an officer, director or stockholder in the new corporation and until the structure was completed and rented, the stock to which your Petitioner was entitled, would remain in the Treasury of the corporation and that at that time one-third ($\frac{1}{3}$) of the stock in each corporation would be issued to him (R. 25).

Your Petitioner, relying upon these statements and representations, agreed to this arrangement. Thereafter, fifteen hundred (1,500) shares of the total twenty-four hundred (2,400) shares were issued to Helen C. Calvert, Charles Henry Smith, and Malcolm Kilduff in equal amount of five hundred (500) shares each (R. 25). In the spring of 1941 the entire structure was completed, and your Petitioner demanded his share of the stock of the corporation from the Respondent Charles Henry Smith, but was refused the same (R. 27). Thereafter, your Petitioner was inducted into the United States Navy on September 27, 1942, and he was prevented from pursuing his rights against Respondents until his discharge on September 27, 1945 (R. 19 and 27). That since September, 1941, the bill of complaint charges that the Respondents procured by fraud while acting in a fiduciary capacity all of the stock in the corporation known as Auburn Builders, Inc. and are now the sole and complete owners of the entire development (R. 27). Your Petitioner further alleged that the common stock had a net worth of at least One Million Dollars (\$1,000,000.00) and that the Respondents had been collecting the rents from the said project as well as dividends which are in excess of One Hundred Thousand Dollars (\$100,000.00) (R. 27). That Respondents have been requested by your Petitioner to turn over to him his share of stock in accordance with the agreement but that

the Respondents have failed and refused, and continue to fail and refuse, to comply with Petitioner's demands.

The bill of complaint further charges fraud and bad faith on the part of the Respondent Charles Henry Smith, his son, and wife, in depriving Petitioner of his stock. Further the complaint shows the military service of the Petitioner.

The reason urged for the allowance of the writ is the refusal of the lower court to give the Petitioner the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940 as Amended, *supra*, by failing to exclude his period of military service as required by that statute, thereby applying the doctrine of laches. The failure of the lower court to apply the Act to Petitioner denied him "due process" under the XIV Amendment to the Constitution of the United States of America.

WHEREFORE it is respectfully submitted that the petition should be granted.

SAMUEL B. BROWN,
Counsel for Petitioner,
514 Colorado Building,
Washington 5, D. C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 219

LEWIS MONTAGUE,

Petitioner,

vs.

CHARLES HENRY SMITH, CHARLES HENRY
SMITH, JR., FANNY J. SMITH, AUBURN GAR-
DENS, INC., A CORP., AUBURN BUILDERS, INC.,
A CORP.,

Respondents

FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

I

Opinion of Court Below

No opinions were filed by the Supreme Court of Appeals of Virginia in affirming the Circuit Court of the City of Alexandria, Virginia in sustaining the demurrers to the bill of complaint filed by Petitioner.

II

Jurisdiction

The Supreme Court of Appeals of Virginia sustained the decree of the Circuit Court of the City of Alexandria, Virginia on the 22nd day of April, 1947 (R. 33). This is a final judgment on the merits leaving Petitioner no further redress except for a writ of certiorari issuing out of this Honorable Court. The Federal question involved in this case is whether the Soldiers' and Sailors' Civil Relief Act of 1940 as Amended, 54 Stat. 1178, 50 U. S. C. A. 501 *et seq.*, must be applied to a member of the military forces and whether the period of his service must be excluded in computing laches or the statute of limitations.

The bill of complaint was predicated upon principles of equity charging fraud on the part of Respondent Charles Henry Smith, who was Petitioner's attorney at the time of the acts complained of. The demurrer filed by Respondents set up, among other things, laches as a bar in spite of the allegation in the complaint that Petitioner had been in the military service from September 27, 1942 until September 27, 1945 (R. 19 and 27).

III

Statement of Case

The complaint in equity charges Respondent, Charles Henry Smith, with fraud while acting as attorney for the Petitioner in denying him his interest in a real estate development which Petitioner and his foster sister, Helen C. Calvert, had initiated and later sought legal guidance of the Respondent Charles Henry Smith. Petitioner's share amounts to one-third ($\frac{1}{3}$) of One Million Dollars (\$1,000,-

000.00). The bill of complaint (R. 7, 19) charging fraud on the part of Charles Henry Smith as a fiduciary, is well laid so as to make out a case calling for equitable relief. It charges Smith, while acting as attorney for Petitioner, of practicing fraud and deception in depriving him of his stock ownership in a corporation and of ultimately owning a development worth in excess of One Million Dollars (\$1,000,000.00) during the time when Smith was acting as attorney for the Petitioner. A reading of the complaint (R. 7, 27) sets forth the details of the transaction and the facts which the lower court held demurrable. Reference is here made to the complaint (R. 7, 27) for the factual statement.

IV

Specification of Error

The Supreme Court of Appeals of Virginia in sustaining the decree of the Circuit Court of Alexandria, Virginia, which had sustained the demurrer to the Petitioner's bill of complaint, is erroneous in that it failed to extend to the Petitioner the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 as Amended, 50 U. S. C. A. 525, 54 Stat. 1181 as Amended October 6, 1942, c. 581.

V

Argument

In his demurrer, Respondent sets forth laches on the part of the Petitioner. This is done despite Petitioner's active service in the military forces of the government during the period involved. Other than laches, it is submitted that a clear cut case both under the common law and under the law in force in the State of Virginia, the Petitioner set forth a grievance calling for equitable relief.

The Supreme Court of Appeals of Virginia has held that laches in most instances is a mixed question of law and fact and should not be disposed of on demurrer. *Wilkerson v. Wilkerson*, 144 S. E. 497, 151 Va. 322. Yet the court below failed to apply its law to Petitioner and also refused to extend him the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940, as Amended, *supra*, tolling the statute of limitations during the period of military service. The military service of the Petitioner was specifically set forth to negative the defense of laches. Therefore, that defense could only be disposed of on the merits. (30 CJS Sec. 270, p. 712.)

The substance of Petitioner's complaint shows a very valuable interest in a corporation seized by his attorney, who was representing him throughout the proceedings, through fraud (R. 7, 27). The only change in circumstances since the discovery of the fraud and since the suit was filed was the change of ownership of the stock from that of Petitioner and his foster sister to that of the attorney representing them in the transaction, the Respondent Charles Henry Smith, in this case. When a fiduciary benefits at the expense of one who confides in him, there is a presumption of fraud. *Atkinson v. Jones*, 158 S. E. 650, 110 W. Va. 463.

By sustaining the demurrer, the lower court could not have found a failure to state a cause of action. Therefore, it must have relied upon the demurrer raising the defense of laches. The facts reasonably inferable from the complaint in the absence of laches, clearly sets forth a duty on the part of the Respondent Charles Henry Smith, to deliver the stock to the Petitioner and his refusal to do so. Succinctly stated, Respondent Charles Henry Smith, the then attorney for Petitioner, is now the owner in control of the property formerly belonging to Petitioner and his

foster sister as set forth in the bill of complaint. He is charged in the bill with having obtained the property by fraud and deception. An attorney cannot acquire an interest adverse to that of his client, without his client's consent; and if he does so he is a constructive trustee for his client. In other words, because of the confidential and fiduciary nature of the attorney's relationship and his opportunities to exert undue influence over his client, the "arms length rule" which permits the parties to an ordinary business or mercantile transaction to out-try and out-maneuver the other and obtain an advantage at the expense of candor and ingeniousness, is entirely inapplicable to business dealings or transactions between the attorney and his client after the employment has been undertaken. All such transactions or dealings are regarded with suspicion and disfavor and are discouraged by the policy of the law and will be closely scrutinized by the courts which will lean against the attorney. (7 CJS Sec. 126-127, p. 960-962.)

VI

Conclusion

The Supreme Court of Appeals of Virginia, by sustaining the demurrer to the complaint, has failed to afford the Petitioner the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940, as Amended, 50 U. S. C. A. 525, 54 Stat. 1181 as Amended October 6, 1942, c. 581, and has refused to follow the principles laid down by this Court in the case of *Boone v. Lightner*, 319 U. S. 561, 63 Sup. Ct. 1225.

It is respectfully submitted that the case is one calling for the exercise by this Court of its supervisory powers, and therefore, because of the important Federal question involved, a writ of certiorari as prayed for should be

granted, to the end that the judgment below may be ultimately reversed and that the case be remanded to the lower court with instructions to that court to overrule the demurrer and require the defendant to answer the bill of complaint filed herein.

Respectfully submitted,

SAMUEL B. BROWN,
Counsel for Petitioner,
514 Colorado Building,
Washington 5, D. C.

(1599)

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CHARLES CLARK, CLERK
U. S. S.

Supreme Court of the United States

OCTOBER TERM, 1940

NO. 210

LEWIS P. MONTAGUE

**CHARLES HENRY SMITH, CHARLES HENRY
SMITH, JR., FANNY J. SMITH, ET AL.**

**PETITION FOR RECONSIDERATION FOR A WRIT OF
CERTIORARI OF SUPREME COURT OF APPEALS
OF THE STATE OF VIRGINIA AND BRIEF IN
SUPPORT THEREOF**

**Presented by
Plaintiff
LEWIS P. MONTAGUE**

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 219

LEWIS P. MONTAGUE

v.

CHARLES HENRY SMITH, CHARLES HENRY
SMITH, Jr., FANNY J. SMITH, ET AL.

**PETITION FOR RECONSIDERATION FOR A WRIT OF
CERTIORARI OF SUPREME COURT OF APPEALS
OF THE STATE OF VIRGINIA.**

Presented by
Plaintiff
LEWIS P. MONTAGUE

To the Supreme Court of the United States
Chief Justice Frederick M. Vinson and Associated Justices
Most Honored Sirs:

I am appealing to you in my own behalf for a reconsideration of my plea entered October Term 1947, Number 219. Lewis Montague, petitioner versus Charles Henry Smith et al. on petition for a writ of Certiorari of the State of Virginia.

My attorneys, Raskin, Espenshade and Hines of Philadelphia, with Mr. Samuel B. Brown, Colorado Building, Washington, D. C., has abandoned my case. When it was refused in October, I urged my attorney to continue. Mr. Brown promised me faithfully to do so. My sister came many times to his office to urge him to file a plea. On April the ninth, 1948, Mr. Brown, in his Alexandria office, promised to file the papers he had prepared April the twelfth. When found that no papers had been filed, I asked at the Record Room for advice. They informed me that I could enter papers in my own behalf. I have these six transcripts of Record, all other papers are in Mr. Brown's possession. I feel I cannot rely on these attorneys as they have neglected me shamefully.

Should my plea for help meet with your approval, may I ask you to appoint me an attorney? The entire history of this case is in the Transcript but it does not include the disappointments and heartbreaks I have suffered. I have no other papers to present. I hope this will be sufficient to secure me consideration.

I was in Naval Aviation for three years and entered my case on my first furlough. I was stationed near Honolulu so could not fight for my cause.

My attorneys Raskin, Espenshade and Hines engaged the services of Frederick Flynn of Alexandria. He died a few days before it came to trial. From then on my case has met with difficulties.

On my own behalf may I present my case for your consideration and plead for leniency.

Thanking you for any help you care to extend to me.

I remain very respectfully
LEWIS P. MONTAGUE
Service No. 602-58-30

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Supreme Court of the United States

OCTOBER TERM, 1948.

NO. 219

LEWIS MONTAGUE, *Petitioner,*

v.

CHARLES HENRY SMITH, CHARLES HENRY
SMITH, Jr., FANNY J. SMITH, AUBURN GAR-
DENS, INC., A CORP., AUBURN BUILDERS, INC.,
A CORP., *Respondents.*

FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

PETITION FOR RECONSIDERATION FOR A WRIT OF CERTIORARI OF SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The Petition of Lewis Montague respectfully shows to
this Honorable Court as follows:

Summary Statement of the Matter Involved.

This is a Petition by Lewis Montague for a writ of cer-
tiorari to the Supreme Court of Appeals of Virginia to
review a decision of that Court (R. 33) which rejected the
Petition of Lewis Montague for an appeal from a decree

entered by the Circuit Court of the City of Alexandria, Virginia, on the 4th day of November, 1946, the effect of which was to affirm the decree of the said Circuit Court which had by its decree on the aforesaid date sustained the several demurrers filed by the Respondents to the Bill of Complaint, as amended, and dismissed the same (R. 34-35). This decree was final.

Federal Jurisdiction.

The jurisdiction of this Court is invoked under the Soldiers' and Sailors' Civil Relief Act of 1940 as Amended (Act October 17, 1940, c. 888, 54 Stat. 1178, 50 U. S. C. A. 501 *et seq.*), and further under the provisions of the XIV Amendment to the Constitution of the United States of America.

Question Presented.

Whether the lower courts in denying Petitioner his rights to maintain his cause of action violated the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 as Amended, *supra*, and further whether there was a violation of Petitioner's rights under the XIV Amendment to the Constitution of the United States of America wherein Petitioner was denied the benefit of the "due process clause."

Statute Involved.

Soldiers' and Sailors' Civil Relief Act of 1940, as Amended (R. 19), 50 U. S. C. A. 525, 54 Stat. 1178 as Amended October 6, 1942, c. 581.

Opinions.

The Circuit Court of the City of Alexandria, Virginia, in sustaining the demurrers filed against the amended bill in equity of the Petitioner, gave no reason for its action. There was a previous case presented to the Court in Alexandria involving the interest of Miss Helen C. Calvert, my

sister. The first corporation was issued to Helen C. Calvert, President; Malcolm M. Kilduff, Treasurer; Lewis P. Montague, Secretary. Her case was sustained by demurrer on two occasions. The judge gave no reason for his decisions. She appealed to the Supreme Court of Virginia. When Mr. Ball, attorney for Mr. Smith was on the floor, he deliberately confused my case with Miss Calvert's, claiming I was merely a tool used by her to persecute Mr. Smith. The Supreme Court of Appeals in filing its decree rejecting the petition for appeal and sustaining the action of the Circuit Court of the City of Alexandria, Virginia, likewise filed no opinion giving reasons for its action.

When my case was presented for consideration at a verbal hearing in Richmond, the two judges recalled Miss Calvert's case. It became evident that they were not willing to reverse their former opinions.

Reasons Relied on for Allowance of Writ.

Your Petitioner, Lewis Montague, filed a bill of complaint in the Circuit Court of the City of Alexandria, Virginia, wherein he set forth that he was the foster brother of Helen C. Calvert of Alexandria, Virginia, and was jointly interested with her in the development of an apartment building or multiple dwelling to be erected upon a parcel of land owned by Helen C. Calvert and which was located in Alexandria, Virginia (R. 19-20).

For this purpose a corporation was organized. Your Petitioner became one of the incorporators and officers and in consideration of the natural love and affection between the Petitioner and his foster sister, Helen C. Calvert, and the further consideration of services performed by your Petitioner, your Petitioner was to receive one-third ($\frac{1}{3}$) of the total stock to be issued by the corporation (R. 20-21). The corporation which was organized by your Petitioner and his foster sister was known as Auburn Gardens, Inc., and your Petitioner served as incorporator, Vice President, and a director (R. 21). Your Petitioner's foster sister,

Helen C. Calvert, transferred to the corporation, in consideration of the stock to be issued to her, the land consisting of approximately twelve (12) acres in Alexandria, Virginia. Your Petitioner contributed to the legal fees and costs of incorporation, and for the preparation of the architectural drawings (R. 22). The mother of Miss Calvert, Mrs. Susan P. A. Calvert, adopted me when I was an infant. When Miss Calvert formed the corporation she asked Mr. Carl Budwesky, the attorney obtaining the charter, if it was necessary for her to deed to me portion of the twelve acres, so that I would be an equal contributor to the corporation. Mr. Budwesky assured her that would be unnecessary, as a deed would be drawn to Auburn Gardens, Inc. Helen C. Calvert, Malcolm Kilduff and Lewis P. Montague were equal owners. Later when this corporation deeded the land to Auburn Gardens No. 2 I was not present or signed the deed. They failed to notify me. Your Petitioner and his foster sister consulted with the Respondent, Charles Henry Smith, a member of the bar of Virginia, with offices in the City of Alexandria, on or about September 20, 1938 for the purpose of securing his services as an attorney to represent your Petitioner and other parties in interest for the purpose of rezoning the land for the construction of the apartment building (R. 22). Mr. Budwesky became assisting city manager of Alexandria and could not represent us at a zoning hearing. He gave up private practice. At this time Respondent Charles Henry Smith suggested that he be paid for his services with stock to be issued by the corporation, to which your Petitioner and his foster sister consented. The amount of stock to be issued was not definitely agreed upon between the parties (R. 23). There elapsed nearly a year before the Federal Housing Authority granted the commitment. The Auburn Gardens, Inc. No. 1 was the vehicle used to obtain the commitment. All three parties performing equally. Mr. Smith requested to be allowed to join. His fee to be allotted to him for services to be rendered, including his zoning fee. Subsequently, Charles Henry Smith, as his attorney ad-

vised your Petitioner and his foster sister that the Federal Housing Authority would not accept the corporation and that it would be necessary to organize a new corporation in order to qualify (R. 23-24). Mr. Chas. Henry Smith and Major Malcolm Kilduff represented Miss Calvert and I before the Federal Housing Authority. We accepted all their statements as facts. Followed their suggestions. Thereupon, said Respondent Charles Henry Smith, applied for a new charter and changed the name of the corporation to Auburn Builders, Inc., which was done on August 31, 1939. The authorized capital stock of Auburn Builders, Inc. was twenty-four hundred (2400) shares of the par value of One Hundred Dollars (\$100.00) each (R. 24). Prior to the incorporation of Auburn Builders, Inc., Helen C. Calvert, for a nominal consideration on February 18, 1939, conveyed by deed her right, title and interest to the parcel of ground to Auburn Gardens, Inc. (R. 24). Charles Henry Smith was elected Secretary-Treasurer of Auburn Builders, Inc., being the then attorney for your Petitioner, Malcolm Kilduff was President and Helen C. Calvert was Vice-President of said Auburn Builders, Inc. Your Petitioner neither resigned nor did he receive any notice of the change, nor had he assigned or released his interest in the corporation known as Auburn Gardens, Inc. Thereafter, Charles Henry Smith, as attorney for your Petitioner, advised your Petitioner and Helen C. Calvert that since all parties who were officers and directors or stockholders in a corporation applying for a guarantee from the Federal Housing Authority would be investigated and questioned as to their financial worth, it would be better that your Petitioner's name should not appear as an officer, director or stockholder in the new corporation and until the structure was completed and rented, the stock to which your Petitioner was entitled, would remain in the Treasury of the corporation and that at that time one-third ($\frac{1}{3}$) of the stock in each corporation would be issued to him (R. 25).

Your Petitioner, relying upon these statements and representations, agreed to this arrangement. Thereafter,

fifteen hundred (1500) shares of the total twenty-four hundred (2400) shares were issued to Helen C. Calvert, Charles Henry Smith, and Malcolm Kilduff in equal amount of five hundred (500) shares each (R. 25). In the spring of 1941 the entire structure was completed, and your Petitioner demanded his share of the stock of the corporation from the Respondent Charles Henry Smith, but was refused the same (R. 27). Thereafter, your Petitioner was inducted into the United States Navy on September 27, 1942, and he was prevented from pursuing his rights against Respondents until his discharge on September 27, 1945 (R. 19 and 27). That since September, 1941, the bill of complaint charges that the Respondents procured by fraud while acting in a fiduciary capacity all of the stock in the corporation known as Auburn Builders, Inc. and are now the sole and complete owners of the entire development (R. 27). Your Petitioner further alleged that the common stock had a net worth of at least One Million Dollars (\$1,000,000.00) and that the Respondents had been collecting the rents from the said project as well as dividends which are in excess of One Hundred Thousand Dollars (\$100,000.00) (R. 27). That Respondents have been requested by your Petitioner to turn over to him his share of stock in accordance with the agreement but that the Respondents have failed and refused, and continue to fail and refuse, to comply with Petitioner's demands. The long period of time necessary to complete arrangements I was considered a member of this corporation, Mr. Smith giving me to understand that the arrangement presented by him, that I should not appear at the Federal Housing Authority was a splendid idea, as I was quite young, and employed at the time.

The bill of complaint further charges fraud and bad faith on the part of the Respondent Charles Henry Smith, his son, and wife, in depriving Petitioner of his stock. Further the complaint shows the military service of the Petitioner.

The reason urged for the allowance of the writ is the refusal of the lower court to give the Petitioner the benefit

of the Soldiers' and Sailors' Civil Relief Act of 1940 as Amended, *supra*, by failing to exclude his period of military service as required by that statute, thereby applying the doctrine of laches. The failure of the lower court to apply the Act to Petitioner denied him "due process" under the XIV Amendment to the Constitution of the United States of America.

WHEREFORE it is respectfully submitted that the petition should be granted.

LEWIS P. MONTAGUE,
Service No. 602-58-30,
3110 Mt. Vernon Ave.,
Alexandria, Va.

Supreme Court of the United States

OCTOBER TERM, 1948.

NO. 219

LEWIS MONTAGUE, *Petitioner*,

v.

CHARLES HENRY SMITH, CHARLES HENRY
SMITH, Jr., FANNY J. SMITH, AUBURN GAR-
DENS, INC., A CORP., AUBURN BUILDERS, INC.,
A CORP., *Respondents*.

FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

No opinions were filed by the Supreme Court of Appeals of Virginia in affirming the Circuit Court of the City of Alexandria, Virginia in sustaining the demurrers to the bill of complaint filed by Petitioner.

II.**Jurisdiction.**

The Supreme Court of Appeals of Virginia sustained the decree of the Circuit Court of the City of Alexandria, Virginia on the 22nd day of April, 1947 (R. 33). This is a final judgment on the merits leaving Petitioner no further redress except for a writ of certiorari issuing out of this Honorable Court. The Federal question involved in this case is whether the Soldiers' and Sailors' Civil Relief Act of 1940 as Amended, 54 Stat. 1178, 50 U. S. C. A. 501 *et seq.*, must be applied to a member of the military forces and whether the period of his service must be excluded in computing laches or the statute of limitations.

The bill of complaint was predicated upon principles of equity charging fraud on the part of Respondent Charles Henry Smith, who was Petitioner's attorney at the time of the acts complained of. The demurrer filed by Respondents set up, among other things, laches as a bar in spite of the allegation in the complaint that Petitioner had been in the military service from September 27, 1942, until September 27, 1945 (R. 19 and 27).

III.**Statement of Case.**

The complaint in equity charges Respondent, Charles Henry Smith, with fraud while acting as attorney for the Petitioner in denying him his interest in a real estate development which Petitioner and his foster sister, Helen C. Calvert, had initiated and later sought legal guidance of the Respondent Charles Henry Smith. Petitioner's share amounts to one-third ($\frac{1}{3}$) of One Million Dollars (\$1,000,000.00). The bill of complaint (R. 7, 19) charging fraud on the part of Charles Henry Smith as a fiduciary, is well laid so as to make out a case calling for equitable relief. It charges Smith, while acting as attorney for Petitioner, of practicing fraud and deception in depriving him

of his stock ownership in a corporation and of ultimately owning a development worth in excess of One Million Dollars (\$1,000,000.00) during the time when Smith was acting as attorney for the Petitioner. A reading of the complaint (R. 7, 27) sets forth the details of the transaction and the facts which the lower court held demurrable. Reference is here made to the complaint (R. 7, 27) for the factual statement.

IV.

Specification of Error.

The Supreme Court of Appeals of Virginia in sustaining the decree of the Circuit Court of Alexandria, Virginia, which had sustained the demurrer to the Petitioner's bill of complaint, is erroneous in that it failed to extend to the Petitioner the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940 as Amended, 50 U. S. C. A. 525, 54 Stat. 1181 as Amended October 6, 1942, c. 581. As I stated before, my case was denied because the judges failed to see my case as an individual plea for justice.

V.

Argument.

In his demurrer, Respondent sets forth laches on the part of the Petitioner. This is done despite Petitioner's active service in the military forces of the government during the period involved. Other than laches, it is submitted that a clear-cut case both under the common law and under the law in force in the State of Virginia, the Petitioner set forth a grievance calling for equitable relief. The Supreme Court of Appeals of Virginia has held that laches in most instances is a mixed question of law and fact and should not be disposed of on demurrer. The demurrers in this case were unjust. I came to Court with a plea, to be heard. After Mr. Ball had concluded his argument the judge sustained the demurrer. According to Mr. Ball's statements, and the judge's decision, I left the court

room convicted of having no part in the property, merely a tool in the hands of a woman (my sister, Miss Calvert). She being accused of being unscrupulous one at that. Never contributed anything. Never had any part in bringing Auburn Gardens into being because Mr. Smith had made it a success. I wanted to grab from him the fruit of his handiwork. A no-body—an upstart, a base creature. Being a demurrer I could not defend these accusations. The demurrer was sustained.

Wilkerson v. Wilkerson, 144 S. E. 497, 151 Va. 322. Yet the court below failed to apply its law to Petitioner and also refused to extend him the benefit of the Soldiers' and Sailors' Civil Relief Act of 1940, as Amended, *supra*, tolling the statute of limitations during the period of military service. The military service of the Petitioner was specifically set forth to negative the defense of laches. Therefore, that defense could only be disposed of on the merits. (30 CJS Sec. 270, p. 712.)

The substance of Petitioner's complaint shows a very valuable interest in a corporation seized by his attorney, who was representing him throughout the proceedings, through fraud (R. 7, 27). The only change in circumstances since the discovery of the fraud and since the suit was filed was the change of ownership of the stock from that of Petitioner and his foster sister to that of the attorney representing them in the transaction, the Respondent Charles Henry Smith, in this case. When a fiduciary benefits at the expense of one who confides in him, there is a presumption of fraud. *Atkinson v. Jones*, 158 S. E. 650, 110 W. Va. 463.

By sustaining the demurrer, the lower court could not have found a failure to state a cause of action. Therefore, it must have relied upon the demurrer raising the defense of laches. The facts reasonably inferable from the complaint in the absence of laches, clearly sets forth a duty on the part of the Respondent Charles Henry Smith, to deliver the stock to the Petitioner and his refusal to do so. Succinctly stated, Respondent Charles Henry Smith, the

then attorney for Petitioner, is now the owner in control of the property formerly belonging to Petitioner and his foster sister as set forth in the bill of complaint. He is charged in the bill with having obtained the property by fraud and deception. An attorney cannot acquire an interest adverse to that of his client, without his client's consent; and if he does so he is a constructive trustee for his client. In other words, because of the confidential and fiduciary nature of the attorney's relationship and his opportunities to exert undue influence over his client, the "arms length rule" which permits the parties to an ordinary business or mercantile transaction to out-try and out-manuever the other and obtain an advantage at the expense of candor and ingeniousness, is entirely inapplicable to business dealings or transactions between the attorney and his client after the employment has been undertaken. All such transactions or dealings are regarded with suspicion and disfavor and are discouraged by the policy of the law and will be closely scrutinized by the courts which will lean against the attorney. (7 CJS Sec. 126-127, p. 960-962.)

VI.

Conclusion.

The Supreme Court of Appeals of Virginia, by sustaining the demurrer to the complaint, has failed to afford the Petitioner the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940, as Amended, 50 U. S. C. A. 525, 54 Stat. 1181 as Amended October 6, 1942, c. 581, and has refused to follow the principles laid down by this Court in the case of *Boone v. Lightner*, 319 U. S. 561, 63 Sup. Ct. 1225.

It is respectfully submitted that the case is one calling for the exercise by this Court of its supervisory powers, and therefore, because of the important Federal question involved, a writ of certiorari as prayed for should be granted, to the end that the judgment below may be ultimately reversed and that the case be remanded to the lower

court with instructions to that court to overrule the demurrer and require the defendant to answer the bill of complaint filed herein.

The question of the time that elapsed I would like to state the difficulties I encountered.

I placed my case in the hands of Paul L. Delaney, Union Trust Building, Washington, D. C. He kept it over a year promising to file it numbers of times. He went into service and gave it up.

On my first furlough I went to Philadelphia and engaged Raskin Espenshade and Hines. They employed Frederick Flynn of Alexandria. He died a few days before the case came to trial. Mr. Brown has failed to file papers at the proper time. I am presenting my case as best I can, having no legal training.

Respectfully submitted,

LEWIS P. MONTAGUE,
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